UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA v. MORRIS E. ZUKERMAN, Defendant.	16 Cr. 194 (AT) ECF Case

SENTENCING MEMORANDUM
ON BEHALF OF DEFENDANT MORRIS ZUKERMAN

Dated: January 13, 2017

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INTRODUCTION

Morris Zukerman, "Mo" to his friends, is a dedicated husband, devoted father and grandfather, and self-made businessman, beloved and respected by people from all walks of life for his generous and kind character. The grand jury's three-year tax investigation—culminating in Mr. Zukerman's guilty plea—has been a punishing and humiliating experience for him. It is an experience from which he will never recover. He stands before this Court, in the words of one of his daughters, "a shadow of himself, suffering immensely and living with the consequences." Ex. A.3 (S. Daly).

Although Mr. Zukerman can never repair the damage he has done to himself, his family, and his legacy, he is determined to make things right with his victims, the United States Treasury and the State of New York. He has already complied with all of the terms of his plea agreement. He has tendered over $37 million to the United States and to the State of New York in fulfillment of any anticipated restitution order, and he has filed or caused to be filed amended federal and state tax returns. He accepts responsibility for his misconduct and is prepared to be punished by this Court, including, if the Court deems it appropriate, a period of confinement.

Subject to the Court's approval, the parties agree that based on the offenses of conviction and certain unprosecuted relevant conduct, Mr. Zukerman's final adjusted offense level under the United States Sentencing Guidelines will be 27, and that the resulting advisory Guidelines range is 70 to 87 months' imprisonment. But "[i]t is now . . . emphatically clear that the Guidelines are guidelines—that is, they are truly advisory." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). They "now serve as one factor among several courts must consider in determining an appropriate sentence" that is "sufficient, but not greater than necessary" to serve the purposes of sentencing set forth in 18 U.S.C. § 3553(a). *Kimbrough v. United States*, 552 U.S. 85, 90, 101 (2007) (internal quotation marks omitted). And when the Guidelines "run amok"—as they do in this case, due to their singled-minded focus on the amount of tax loss from one transaction—courts "place greater reliance on . . . section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences." *United States v. Adelson*, 441 F. Supp. 2d 506, 515 (S.D.N.Y. 2006), *aff'd*, 301 F. App'x 93 (2d Cir. 2008).

Accordingly, Mr. Zukerman submits this sentencing memorandum to assist the Court in determining an appropriate sentence under 18 U.S.C. § 3553(a). Recognizing that a substantial downward variance from the Guidelines is called for here, the United States Probation Office has recommended a sentence of 48 months' imprisonment. Although that recommendation is below the advisory Guidelines range, we submit that a much lower sentence is appropriate. When all factors are considered—including Mr. Zukerman's significant service and generosity to his family, friends, employees, and community; his advanced age [redacted]; the potential harm his imprisonment will pose to his family, businesses, and employees; his unique skill set; and the overwhelming weight the Guidelines place on a single fact (the amount of tax loss)—a shorter sentence of confinement, combined with a special condition of supervised community service with an appropriate organization like The Fortune Society (discussed below), would better satisfy the objectives of sentencing.

FACTUAL BACKGROUND

Since the announcement of Mr. Zukerman's indictment, nearly 100 of his family members, friends, employees, business associates, and community members have come forward to express their support for him. Their letters, attached to this Sentencing Memorandum in Exhibit A, are a testament to the enduring relationships Mr. Zukerman establishes with virtually everyone with whom he comes in contact. We describe below some of the pertinent facts contained in those letters.

A. Personal and Professional Life

1. Childhood and Schooling

Morris Zukerman was born in rural Vineland, New Jersey, in 1944. His mother tragically died from breast cancer when he was just two years old. PSR ¶ 121. After that, he and his younger brother, Robert, were raised by their father, who owned and operated a local wholesale grocery business. *Id.*; Ex. A.9 (Stern); Ex. A.2 (L. Stone). The business demanded long hours from Morris's father. PSR ¶ 121. As Robert's widow, Sonya Zukerman, explains, "[m]ore often than not, the boys were left to fend for themselves." Ex. A.14 (S. Zukerman).

"Given that his father was raising two young boys without a mother, Morris's home was, to put it mildly, 'chaotic,'" observes Marc Stern, a childhood friend. Ex. A.9 (Stern). "[A]lthough there were some family members who assisted with the children, [Mr. Zukerman] and his brother were primarily cared for by their housekeeper." PSR ¶ 121; Ex. A.9 (Stern). "It seemed like every time [Stern] visited, there was a new housekeeper 'in charge.'" Ex. A.9 (Stern). "This obviously took a toll on Morris," who would "visit[] [Stern's] house in order to get cleaned up and have a home cooked meal[.]" *Id.*

When Mr. Zukerman was still a child, his family's home caught fire from a short circuit in one of his toy trains. PSR ¶ 122. The house burned, forcing the family to move to a modest apartment in a two-family home. *Id.*; Ex. A.9 (Stern). Stern observes that the event had "a lasting effect on Morris[,] as we often talked about it over the years." Ex. A.9 (Stern).

For most of his childhood, Mr. Zukerman attended local public schools in New Jersey. Mr. Zukerman "stuttered as a child," but developed "into a confident, loving, considerate and hardworking teenager." Ex. A.26 (B. Sweedler). At age 13, Mr. Zukerman applied, on his own initiative, to boarding school at Phillips Academy Andover. PSR ¶ 122. After succeeding at Andover, Mr. Zukerman attended Harvard College, followed by Cambridge University, then

Harvard Business School. PSR ¶ 140. Mr. Zukerman's youngest daughter, Alexandra, observes that his upbringing in rural Vineland as the son of a grocer "came into stark contrast with the privileged upbringing of other students" at these institutions. Ex. A.4 (A. Zukerman). In her estimation, "[e]very school . . . was a punch and catalyst," and Mr. Zukerman still "bears psychological scars." *Id.*

2. Professional Career

Mr. Zukerman has been consistently employed and has worked hard his entire life. He spent summers in graduate school working as an African Affairs aide in the Office of Secretary of Defense and at The World Bank. After graduate school, he served for one-and-a-half years in the newly formed Office of Management and Budget in Washington, D.C., under former Director George Schultz, who became a mentor to Mr. Zukerman. PSR ¶ 144. Schultz advised Mr. Zukerman to gain experience working in the private sector. Mr. Zukerman took that advice, and a pay cut, to join Morgan Stanley—then a relatively small, privately held firm engaged in advising companies and governments—in 1971. PSR ¶ 143.

As a result of his talent and hard work, over the next sixteen years, Mr. Zukerman rose through the ranks at Morgan Stanley and earned a sterling reputation among his peers. He was named a partner, then co-head of Energy Investment Banking, and later Head of Investment Banking in the West. Among other things, he advised Banco Central de Venezuela on issuing bonds for Venezuela; the Brazilian government on using international markets to finance mining development projects; Apple Computer, Inc., on its first equity offering; and the trustees of the J. Paul Getty Museum and the Howard Hughes Medical Institute on establishing permanent funding. When Mr. Zukerman resigned in 1988 to found his own investment management firm, Morgan Stanley's now-deceased Chairman, Parker Gilbert, wrote to tell him, "[w]hen your partners talk about you, the two qualities consistently mentioned are your ability and your integrity." Ex. A.97 (Gilbert).

Mr. Zukerman parlayed that "ability and integrity" into his own investment management firm, M.E. Zukerman & Co. ("MEZCO"). For the last thirty years, MEZCO and its subsidiaries have successfully invested in a variety of businesses, including a gas pipeline in the Southwestern United States; a liquefied natural gas filling station in the United Kingdom; citrus and vineyard operations in California; and Frontline Medical Communications, a medical publishing company in New Jersey. Mr. Zukerman's investment strategy has been to buy and hold for the long term, nurturing investments to grow, rather than flipping them for quick profit. Mr. Zukerman has also sought to make socially responsible investments: MEZCO's liquefied natural gas filling station investment, for example, will provide clean-burning, low emission fuel for trucks and automobiles, and MEZCO's medical publishing investment provides important clinical information and education to over one million physicians, nurse practitioners, and physician assistants, improving the quality of medical information and care for patients everywhere. Ex. A.65 (Abramson). Mr. Zukerman has also provided much-needed stability to these businesses by staying invested in them—and when needed, investing more capital at substantial risk of loss—during difficult financial times. Ex. A.7 (Grose); Ex. A.89 (Stoneburn). Today, MEZCO and its investments employ over 300 people, and thousands more owe their jobs to Mr. Zukerman's pioneering investments. *See, e.g.*, Ex. A.10 (Janice Kim) (discussing Mr. Zukerman's "absolutely instrumental" investment in an Indonesian startup that now employs "about 10,000" people). Mr. Zukerman remains the lifeblood of these businesses; as Ben Bradford, an employee and Mr. Zukerman's son-in-law, writes, MEZCO "is essentially wholly reliant on one person, Mo," and for most of its investments, Mr. Zukerman "is the link that keeps them alive." Ex. A.11 (Bradford).

3. Family

In the words of Mr. Zukerman's wife, Karen, "[f]amily is central to everything Mo does." Ex. A.1 (K. Zukerman). Everyone who is acquainted with Mr. Zukerman attests to this fact. "Mo's own close family life and relationships with his wife, daughters, sons-in-laws, and grandchildren are evident to all his friends." Ex. A.27 (Foulke). "From when I first met Mo, I was struck by what a family-centered man he is." Ex. A.28 (Rhoda Eitel-Porter). "I have rarely seen someone who cares more deeply for family[.]" Ex. A.29 (Mehta). "[Y]ou could almost touch the warm glow radiating from him to each and every [family] member." Ex. A.77 (Herzig).

Mr. Zukerman and Karen met in their mid-twenties and married six months after they met. PSR ¶ 123; Ex. A.1 (K. Zukerman). They recently had their forty-fifth wedding anniversary. Ex. A.1 (K. Zukerman). The Zukermans' marriage is a remarkably close one; as Karen puts it, they "have rarely been apart." *Id.* They "do everything together, and [Karen] depend[s] on Mo for everything." *Id.* A close friend notes that "[t]here are few couples as close and as supportive of one another as Mo and Karen Zukerman. . . . They are an incredible team." Ex. A.31 (M. Burson). "Karen . . . and [Mr. Zukerman] are entwined in each other's days. A prison sentence for Mo is also one for her." Ex. A.32 (McGrath).

Mr. Zukerman and Karen have three married daughters—Laura (age 39), Sarah (age 36), and Alexandra (age 33)—and four grandchildren between the ages of zero and four. PSR ¶ 123; Ex. A.2 (L. Stone); Ex. A.3 (S. Daly). Laura, Sarah, and Alexandra are highly accomplished women: After graduating magna cum laude from Harvard, Laura earned a graduate degree from the Courtauld Institute of Art in London, studied at Princeton, and worked as a curator at the Morgan Library before leaving the workforce to raise her two children. PSR ¶ 123; Ex. A.2 (L. Stone). Sarah graduated Phi Beta Kappa from Stanford, earned a Masters from the London

School of Economics and a Ph.D. from M.I.T., and is now a professor of political science at the University of Notre Dame researching civil wars and peace-building, international security, and ethnic politics in Latin America. PSR ¶ 123; Ex. A.3 (S. Daly). Alexandra graduated cum laude from Harvard and is now pursuing a Masters in poetry at New York University. Ex. A.4 (A. Zukerman).

As many family members and friends attest, the accomplishments and characters of Mr. Zukerman's daughters speak volumes about the Zukermans' exceptional parenting. Stephanie Harris, a longtime friend of Laura's, writes that Mr. Zukerman "was an incredibly hands-on parent who through his efforts and example molded his daughters into three incredible adults who are successes in their own right. . . . All three of them are not just accomplished but also generous, just like their father." Ex. A.33 (S. Harris). Stephanie's husband likewise writes that "Laura and Sarah and Alexandra are who they are in part because their father lectured them constantly about what is right and wrong in the world and what is to be valued . . . . Mo's daughters are such good human beings because they have always strived to follow their father's example." Ex. A.35 (J. Harris). A friend of Sarah's describes her as "intelligent, curious, passionate and loving," qualities that are "the direct result of [Mr. and Mrs. Zukerman] and the way they view the world." Ex. A.75 (Egan). A friend of Alexandra's similarly writes that "Alexandra has been [her] dearest and [her] most morally upstanding friend for the past decade, and she derives her values from Mo who has been an unflappable and steadfast force in her life." Ex. A.36 (Carega). As a family friend puts it, Mr. Zukerman is "a role model for how to raise a family." Ex. A.40 (Ray Eitel-Porter).

Mr. Zukerman's warm and loving relationship with his daughters and their families continues today. Indeed, "Mo is the center of life for all of them." Ex. A.31 (M. Burson). Laura and her family have chosen to live only a few blocks from Mr. Zukerman and Karen in New

York City "so that [they] could be near him during the years that are supposed to mean the most," and Laura's husband, Robert Stone, works at MEZCO. Ex. A.2 (L. Stone). Sarah's husband, Bobby Daly, recently accepted an oncology position at Memorial Sloan Kettering Cancer Center in New York, and the family is temporarily living with Mr. and Mrs. Zukerman while they search for a new home. Alexandra lived with the Zukermans until a few months ago, and she and her husband still live close by. All three daughters have written letters to the Court expressing their close bond with their father and the importance of his presence and emotional support. Sarah writes:

> I cannot imagine my life without my dad. I speak with my dad every day. Since we moved back to New York, we have breakfast and dinner together daily. I forward him most emails; an encouraging note from a mentor, a moving letter from a student, a publication rejection notice, a request from a friend in need, an exciting development in Colombian peace. He is there with exclamation points for my victories and comfort for my disappointments, big or small. When I run in Central Park, he bikes right alongside me, to keep me safe. When I was in labor with my first child, he drove me to the hospital, holding my hand through each contraction. . . . During many of life's trying moments, he has wiped my tears. From the time I was young, he has been and remains present as a pillar in every step of my life: emotional, intellectual, professional, and personal.

Laura puts it similarly:

> From my earliest memories until now, there has never been an important moment in my life . . . that my father has missed. . . . My father walked me to school every day when I was young, taking extra time to sit with me and talk before I went in through the doors; taught me how to swim; coached my soccer games; attended all of my basketball tournaments; took me on my college visits; encouraged me to take risks in my early career; traveled to check in on me and take me to dinner when I moved abroad; read all of my academic papers and celebrated my professional triumphs; picked me up off the floor when I ended my first serious relationship; walked me down the aisle at my wedding; drove me to the hospital in the middle of the night when I was in labor with my first and second child; and now, as a grandfather, comes to spend time with my children every single afternoon, rain or shine.

Ex. A.2 (L. Stone). As one close friend describes it, Mr. Zukerman "is still central and vital to [his daughters'] worlds. These are three brilliant young women who still need their father." Ex. A.33 (S. Harris).

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] Mr. Zukerman is not just a pillar of his children's lives; he is also a central figure in the lives of his young grandchildren. Sarah observes that "MoMo, as they call my father, is . . . immediate family to my children." Ex. A.3 (S. Daly). Her husband, Bobby Daly, writes that his sons "have grown so close to 'MoMo' and it is hard to imagine a world where he is not there . . . . Losing him to prison[] would be losing a guiding force in their young lives." Ex. A.13 (R. Daly). Laura likewise observes that she has "taken an absolutely fundamental pleasure . . . in watching [Mr. Zukerman's] relationship with [her] two young children develop and flourish," and that the possibility of his being separated from them "breaks [her] heart every single day." Ex. A.2 (L. Stone).

Mr. Zukerman is also, in the words of one cousin, "the backbone" of his extended family. Ex. A.26 (B. Sweedler). "Whenever anyone in the family had a problem or an illness or a happy occasion, Mo was there to support us or celebrate with us." *Id.* Another relative notes that Mo has been "integral" to keeping his extended family together. Ex. A.16 (Bloch). "While Mo's love, generosity and goodness of heart have always been evident in his devotion to his immediate family, these qualities have enriched all our lives." *Id.*

One of many examples of Mr. Zukerman's love and generosity towards his extended family is his commitment to his younger brother, Robert—who tragically died from cancer during the investigation of this case—and Robert's family. According to Robert's widow, "Bob really depended on his older brother for love and support[,] which Mo gave unconditionally until the day Bob died." Ex. A.14 (S. Zukerman). "Mo's devotion to Bob helped him stay strong even amid years of turmoil. I often heard Bob say if it weren't for Mo he could not have made it through it all." *Id.* Mr. Zukerman's devotion to Robert is exemplified by his unconditional gift to Robert of his 50% share of their father's wholesale grocery business. *Id.* When Robert was diagnosed with pancreatic cancer, "Mo did everything in his power to help and support Bobby, deal with his doctors and treatments." Ex. A.26 (B. Sweedler). After Robert died in 2015, Mr. Zukerman once again stepped in to help Sonya with Robert's estate and the sale of the family business. Ex. A.14 (S. Zukerman); Ex. A.2 (L. Stone). As Sonya puts it, "[t]he past year has been one of the most painful years of my life and Mo has stood by me even in the face of his own difficulties." Ex. A.14 (S. Zukerman).

Mr. Zukerman likewise has taken a close interest in the care of his nephew, Robert's son Ethan, who at age three nearly drowned and suffered severe, permanent brain damage. Ex. A.39 (Eisenstat). Mr. Zukerman took responsibility for and committed substantial time to the multi-year legal action to recover for Ethan's injury; made arrangements to manage the recovered funds; and remains involved in stewarding those assets. *Id.*; Ex. A.9 (Stern). He assisted in making Ethan's living arrangements when Ethan's parents divorced and has "continued to be of great support" to Ethan over the years. Ex. A.39 (Eisenstat). Ethan's stepmother credits "Mo's determination and guidance" as the reason that Ethan is "ensure[d] care for . . . the remainder of his life." Ex. A.14 (S. Zukerman). "With [Ethan's father] now gone, Morris's role in Ethan's life is even more essential." Ex. A.9 (Stern).

Many other family members have also written to express the important role Mr. Zukerman has played in their lives. Bobby Daly, Mr. Zukerman's son-in-law, describes the close and caring relationship Mr. Zukerman had with Bobby's father—a widower whose wife died of cancer—as he struggled with, and eventually succumbed to, the same disease:

> Mo was a safe harbor in the turbulent waters of [my father's] diagnosis. He frequently visited my father both at home and at the hospital and was at his bedside providing comfort shortly before his passing. . . . His generosity was also on display in offering to assist with any financial needs resulting from the disease, such as physical therapy. I will always be grateful to Mo for this.

Ex. A.13 (R. Daly). Bobby's brother similarly recounts the comfort Mr. Zukerman gave to his father in the last moments of his life, which he attributes to his father's "understanding that Mo would serve the role as a father figure and stand as the bedrock of our families." Ex. A.41 (M. Daly). Multiple members of the Daly family attest that Mr. Zukerman indeed "stepped up" after the loss of their parents to serve as a surrogate parent and grandparent. Ex. A.19 (Katie Daly); Ex. A.42 (Kristen Daly). "I have two girls and Mr. and Mrs. Zukerman are their grandparents." Ex. A.19 (Katie Daly). "Mo Mo as they call him is a joy for them. . . . I cannot imagine my girls not having this North Star that I have benefited from." *Id.*

Mr. Zukerman has also developed a familial relationship with his longtime housekeepers, Gloria Arteaga and Gisela "Rosa" Lopez, and their families. *See* Ex. A.30 (G. Arteaga); Ex. A.43 (Lopez). This close bond has been observed by numerous visitors to the Zukermans' home over the years. *See, e.g.*, Ex. A.12 (C. Burson); Ex. A.24 (Naj); Ex. A.28 (Rhoda Eitel-Porter); Ex. A.51 (V. Gallet de Saint Aurin). That Mr. Zukerman has developed an unusually close and loving relationship with these individuals is not surprising, given the important role his childhood housekeepers played in his life. Equally unsurprising is the tremendous compassion and generosity he has shown to them over the years. According to Rosa, Mr. Zukerman "has been there for [her] when [she] needed [financial] help," and on one occasion loaned her $29,000. Ex. A.43 (Lopez). Mr. Zukerman paid for Rosa's nephew, Francisco (known by the family as Paco), to attend college, gave Paco a job when he dropped out, and let Paco keep that job even after he misused the Zukermans' credit card. *Id.* Mr. Zukerman also has helped Paco's daughter in numerous ways, paying for piano, swimming, and rowing lessons, and giving her gifts for her education. *Id.* When Carlos Arteaga, Gloria's son, was wrongly accused of a crime (a case of mistaken identity), Mr. Zukerman "took it upon himself to hire an attorney and a team of investigators to help." Ex. A.8 (C. Arteaga). Thanks to Mr. Zukerman, the charges were dropped. In Carlos's words, "[t]he generosity and support that Mo extended to me and my mother during that time was priceless. . . . If I could trade places with Mo at this very moment, I would with no hesitation; because I feel I owe this man the freedom that I have today." *Id.*

B. Hardworking Businessman and Caring Employer

Many letters submitted by Mr. Zukerman's current and former employees portray a generous, supportive, hardworking manager who cares deeply for his employees. Nowhere is this more evident than his extraordinary generosity to employees and their families during times of personal crisis. Ole Peter Andersson, the ranch manager for United California Citrus—one of MEZCO's investments—writes that "[t]o be employed by Mo is a blessing":

> Twenty three years ago I was injured in South Africa and was extremely close to death. I was hospitalized and spent 15 days in ICU of which the first 5 days I had [a] 20-30% chance of survival. . . . When my wife informed Mo about my accident and subsequent life threatening injuries, Mo, without hesitation informed my wife that he would cover all expenses and that her focus should be to ensure my recovery and her well-being and not to worry. Upon returning to the United States, I found that my salary was paid as if I had not left[.]

Ex. A.5 (O. Andersson).

Peter Andersson's experience is not unique. [redacted]

These are just illustrative examples; Mr. Zukerman's kindnesses towards his employees are frequent occurrences. When Mr. Zukerman "heard about a ranch-hand . . . who was at risk of defaulting on the loan on his pickup truck, . . . [Mr. Zukerman] responded by having the firm pay off the loan and giving the employee a new loan at a lower rate and with the time he needed to pay it back." Ex. A.6 (Cender). To encourage the vineyard manager at San Ysidro to open an educational savings account for his daughter, Mr. Zukerman personally funded the account with a $2,000.00 direct deposit and automatic yearly deposits thereafter. Ex. A.25 (Cardenas). [redacted] "If someone needs a loan [or] extended time to go home to Mexico," Mr. Zukerman has been there to help. Ex. A.5 (O. Andersson).

Mr. Zukerman has also repeatedly demonstrated willingness to put the wellbeing of the hundreds of people employed by MEZCO ahead of profits. "[I]t has always been one of Mo's core values to recognize both the personal and professional needs of his employees, even to the potential detriment of the firm's performance." Ex. A.6 (Cender). Among other things, Mr. Zukerman put "significant capital in [Frontline] during 10 years of great losses," thereby "maintain[ing] the jobs of over 200 employees," and "[r]epeatedly advis[ed] the executive team . . . to minimize or completely avoid layoffs or firings, even when great financial losses were being incurred." Ex. A.6 (Grose). Many have written to express concern for these employees in Mr. Zukerman's absence. "Unlike a traditional holder of an investment portfolio, Mo knows and cares at a personal level about these businesses and their employees." *Id.* "As the Firm faces a situation where Mo may be pulled away from the businesses he built, there is reasonable concern that several of the businesses will fail with the resulting effect on hundreds of employees. Several of the investments are highly personal and unprofitable and if Mo is removed from these businesses, they will likely face imminent spirals into bankruptcy." Ex. A.11 (Bradford). As Peter Andersson puts it, "the men and I need Mr. Zukerman in our lives. He is the breath and soul of United California Citrus." Ex. A.5 (O. Andersson).

Mr. Zukerman's willingness to put people before profits has earned him the utmost loyalty and respect of both his employees and his business partners. In the words of one employee, "I continue to work at [MEZCO] in large [part] because of Mr. Zukerman." Ex. A.17 (D. West).

C. Commitment to Others

Mr. Zukerman's generosity extends far beyond his immediate family and employees. Over the years, he has given liberally of both his time and money to cultivate the growth, education, and well-being of young people of all backgrounds and to support and enhance his community.

1. Charitable Contributions

Education was a transformative experience for Mr. Zukerman, and he, in turn, has made investment in education a principal focus of his charitable efforts. His "contributions have not been of bricks and mortar and self-aggrandizement but of investments in quality teaching, in the promulgation of social values, innovative ideas and research and in enhanced educational opportunities for students." Ex. A.12 (C. Burson). He has donated millions of dollars over the years to fund the work of educators and researchers, including:

- A professorship at Harvard with a commitment of $5 million. Ex. A.37 (French).
- Ten graduate fellowships at Harvard's Center for the Brain. Ex. A.37 (French); Ex. 101 (Fellowship Report).
- A fellowship for teaching and research at Phillips Academy with a commitment of $1.5 million. Ex. A.44 (Israel); Ex. A.98 (Underwood).
- Fellowships at the Center for International Security and Cooperation at Stanford. Ex. A.1 (K. Zukerman).
- Research fellowships at King's College, Cambridge. Ex. A.44 (Israel).
- A teacher development program at The Spence School. Ex. A.44 (Israel).
- A donation of $250,000 to establish a paid internship program at The Morgan Library. Ex. A.28 (Rhoda Eitel-Porter); Ex. A.100 (Pierce).
- Support for scientific research through the Earthwatch Institute. Ex. A.23 (Brewster); Ex. A.12 (C. Burson).

Many of these fellowships are funded in perpetuity. Ex. A.1 (K. Zukerman). Mr. Zukerman has also made significant donations to the Metropolitan Opera and the Metropolitan Museum of Art, including financial contributions and loans of artwork. Ex. A.45 (Christiansen); Ex. A.99 (Rafferty). He has given his time to serve on the boards of The Spence School, Phillips Academy, and Harvard, as a member of the Harvard Committee on University Resources, as a fellow of King's College, Cambridge, as a trustee of The Jackson Laboratory, and as a member of the Met's Visiting Committee on European Paintings.

Mr. Zukerman has also prioritized charitable work in the community around his home in Isleford, Maine. Ex. A.47 (Evans). He was instrumental in starting one of the only community programs for young people on the island, a sailing program for primarily low-income children, and he has been a leader in the program for many years. Ex. A.18 (Henry); Ex. A.21 (Merrill). He has also made substantial financial contributions to improve services at a local hospital, support conservation efforts in the area, build low-income housing, and fund other community programs for local residents. Ex. A.27 (Foulke). In total, Mr. Zukerman has contributed millions of dollars and countless hours to a variety of charitable causes over the years, "touch[ing] many lives and communities through his passions and service." Ex. A.48 (Limpert).

2. Mentorship

In addition to his charitable work, Mr. Zukerman has also mentored and supported dozens of young people from a variety of backgrounds in a more informal—but no less meaningful—capacity. Numerous younger beneficiaries of Mr. Zukerman's guidance and generosity have written letters attesting to the significant impact he has had in their lives. Ex. A.8 (C. Arteaga); Ex. A.10 (Janice Kim); Ex. A.11 (Bradford); Ex. A.15 (G. Nattino); Ex. A.18 (Henry); Ex. A.19 (Katie Daly); Ex. A.20 (Clark); Ex. A.21 (Merrill); Ex. A.29 (Mehta); Ex. A.38 (Cook); Ex. A.47 (Evans); Ex. A.48 (Limpert); Ex. A.49 (P. Nattino); Ex. A.50 (de Gentile); Ex. A.51 (Gallet de Saint Aurin); Ex. A.52 (Fuisz); Ex. A.53 (Mayberry); Ex. A.54 (Tavlan); Ex. A.57 (D. Brichant).

Mr. Zukerman has stepped in to provide guidance and encouragement to young people during critical periods in their lives and "is always ready to help." Ex. 43 (Lopez). One local resident from Little Cranberry Island described how, as a young man, he was dismissed from his position as a sailing instructor due to "unacceptable and irresponsible behavior," but "Mo knew of my difficulties and resolved to turn this very dark time in my life into an opportunity. . . . He offered me a second chance when I desperately needed it and saw in me the potential to rise up, conquer my fears and become a leader." Ex. A.18 (Henry). Another young woman wrote:

> Mr. Zukerman has been my mentor and my role model for the last ten years. . . . [After I was laid off,] I was devastated, embarrassed and lost. . . . Mr. Zukerman heard about my situation through [his daughter] and reached out to me. I went to his office to meet. It was only supposed to be a half hour meeting and he spent over four hours with me. He cancelled his meetings. I could not believe he took the time and energy out of his busy day to help me. . . . I would not be where I am in my career if it was not for him.

Ex. A.19 (Katie Daly). A friend of one of Mr. Zukerman's daughters wrote about Mr. Zukerman's encouragement when she began her first job at a retail store:

> Mr. Zukerman took it upon himself to come to the store and congratulate me on the job in person. He advised me to work hard and learn as much as I could . . . , and he told me about one of the first jobs he ever had. This visit left a lasting impression on me.

Ex. A.52 (Fuisz). Another young man wrote:

> [W]hen I was thinking of changing careers . . . Mr. Zukerman proactively invited me to a meeting at his office, and took several hours away from work to discuss wide-ranging ideas and provide valuable advice. I have benefited from Mr. Zukerman's time, counsel and conversation in many other instances since then . . . . On its face, this may not sound all that remarkable, but in my experience it is rare for people to go out of their way to engage on a consistent basis with younger people with whom they have no previous connection, family bond, or other tie creating a sense of obligation. Yet Mr. Zukerman seems to have offered this kind of friendship widely—not only to me, but to several others I know from the younger generation.

Ex. A.20 (Clark).

These are just a few illustrative examples. As one young woman explained, "Mo is unbelievable as a mentor. He encourages you to grow into a larger and more capable person than you ever thought possible." Ex. A.10 (Janice Kim). The guidance and encouragement Mr.

Zukerman has given has left a lasting impression; as one young man wrote, "Mo Zukerman had a huge impact on my life; he has been a mentor and a guide for me. . . . I don't know how I will be able to thank him for what he has done for me: However[,] I hope that if I will be given the chance to help a young man or woman in their academic and personal growth[,] I will be as good to them as Mo has been to me." Ex. A.15 (G. Nattino). When this young man's father asked why Mr. Zukerman had been so generous to his son, "[Mr. Zukerman] answered that we, the adults, are all responsible for the new generation." Ex. A.55 (A. Nattino).

One of the qualities that makes Mr. Zukerman such an outstanding mentor is his deep and genuine interest in others, a characteristic his family and friends have observed in abundance. "While working with Mo, he would always intermittently ask me how to say things in Korean (as he does with anyone who speaks another language!). He is authentically, insatiably curious about every person and every culture to the core!!!" Ex. A.10 (Janice Kim). Another writer attests to having observed Mr. Zukerman's "extraordinary ability to take an immediate interest in newly encountered individuals of whatever social background, try and empower them and give them a chance." Ex. A.82 (Cambuzat). As his daughter, Alexandra, puts it: "I've often considered my father's effect on other people's development miraculous, and I believe it is due to the empowerment, autonomy, structure and opportunity he offers them. . . . [M]y dad has a nuanced identity and appreciates nuances in other people." Ex. A.4 (A. Zukerman).

In addition to mentoring, Mr. Zukerman has also generously opened his home to young people from all over the world, hosting a steady stream of houseguests for holidays and longer stays in New York when they needed a bed or a home-cooked meal. As one guest wrote, "there was always room at [his] table for one more." Ex. A.53 (Mayberry). Many have stayed for months at a time, using the Zukermans' home as a base from which to pursue education, internships, and other opportunities in New York. When Mr. Zukerman heard that the German daughter of one of his friends was unhappy at her student housing in New York, "[w]ithout hesitating one second, he offered [her] to stay with them in their apartment. . . . They were so nice to our daughter letting her really feel at home." Ex. A.56 (Bernheimer). A French woman described coming to the United States to study as a 20-year-old and being invited to stay with the Zukermans, observing that Mr. Zukerman treated her "like a member of his family." Ex. A.50 (de Gentile). Mr. Zukerman particularly enjoys opening his home at Thanksgiving, an offer that has been "gratefully received" from those far away from home. Ex. A.40 (Ray Eitel-Porter); *see also* Ex. A.41 (M. Daly). Indeed, for many of these young people, Mr. Zukerman has become a surrogate father. As one of his daughters' friends explained, "the Zukermans kind of raised us all. There was nothing I loved more than going to their house. It was so much like the home I was missing so dearly." Ex. A.33 (S. Harris).

3. Other Kindnesses, Big and Small

Mr. Zukerman's commitment to improving the lives of others also manifests itself in day-to-day acts of kindness that defy categorization. For example, Peter Andersson writes of Mr. Zukerman's generosity towards Hank Oliver, "the last known pure blooded Choinumni Native Indian":

> Hank had lived and still lives on [the United California Citrus property] in a small modest dwelling that belongs to the [company]. This land and surrounding land is the ancestral homeland of the now extinct Choinumni Tribe. Mo has allowed Hank to occupy this dwelling and live out his life here free of charge since 1991. I venture to say one would travel far and wide to find a property owner as generous and understanding as Mo has and is toward Hank.

Ex. A.5 (O. Andersson). When the only child of his friend, Vance Van Dine, was killed in a plane crash, "Mo stayed in close contact and helped Vance, including financially, through the very hard times that followed [his child's] death," enabling Vance and his wife to stay in their home. Ex. A.23 (Brewster). Joe Merrill, a longtime neighbor in Maine, recalls Mr. Zukerman going out of his way to befriend Joe's brother, who suffered from bipolar disorder and had difficulty engaging socially. Ex. A.21 (Merrill). "Mo was one of my brother's only friends, and the unselfish support Mo gave to my brother will never be forgotten." *Id.*

The letters submitted to the Court paint an overwhelming picture of a man for whom kindness, compassion, and empathy is a way of life. "This is a man who will not walk away from me, the fruit vendor, the taxi driver or anyone else he comes across without showering them with praise, attempting to speak their native language and inquiring into their lives." Ex. A.11 (Bradford). Longtime friend Zbigniew Brzezinski writes that he has "deeply admired" Mr. Zukerman's "ecumenical spirit." Ex. A.22 (Brzezinski). As his daughter, Sarah, observes:

> My father bestows everyone he meets with dignity, from every walk of life, every culture, age, and gender. From waiters at restaurants to doormen at his building to garage attendants to taxi drivers to business associates to old friends to his family, my father treats them all alike. I struggle to explain how remarkable this trait is . . . . My father's daily, small charitable acts toward everyone with whom he comes into contact, when aggregated, show a man that has given so much to his society.

Ex. A.3 (S. Daly).

D. Criminal Investigation

For the last three years, Mr. Zukerman and his family have suffered under the strain of a wide-ranging criminal investigation. Although the investigation originally centered on the tax reporting of a complex corporate transaction—the 2008 sale of an interest in a partnership called [redacted]—the investigation swelled over time into a far-reaching examination of dozens of corporate and individual tax returns. [redacted]

[redacted] More recently, in the wake of Mr. Zukerman's indictment and guilty plea, the family has suffered from substantial negative media attention. The government's press release announcing Mr. Zukerman's indictment triggered publicity in a variety of prominent media sources, including *The New York Times*, *Bloomberg*, and the *Chicago Tribune*, as well as local publications in his Maine community, the *Mount Desert Islander, The Ellsworth American*, and the *Bangor Daily News*.

The physical and psychological toll of the investigation on Mr. Zukerman has been evident to his friends and family. As his wife observes:

> His health is in decline. His deep interests have been taken away along with his love of life. He has been punished with humiliation and sorrow that is unimaginable. . . . [T]he experience and remorse he feels has broken his soul . . . . Life as he and we knew it has been destroyed forever.

Ex. A.1 (K. Zukerman). His middle daughter, Sarah, describes him as "tortured by guilt," "publicly shamed," and "robbed . . . of his dignity," "a shadow of himself, suffering immensely and living with the consequences." Ex. A.3 (S. Daly). His youngest daughter, Alexandra, puts it similarly:

> He agonizes over feeling that he let us down and betrayed us. He writes to friends and apologizes for his breach of loyalty, saying that his wife and daughters have always been loyal. . . . [He] sits for long periods with his hands over his face. The fact that he can no longer hide his affliction means that he suffers beyond imagination.

Ex. A.4 (A. Zukerman). Marc Stern, a friend of over 65 years, observes that "the suffering [Mr. Zukerman] has already endured in this process is itself incomprehensible. The shame that he has brought to his family and himself is truly the most severe punishment I can imagine." Ex. A.9 (Stern). Charles Burson, another longtime friend, writes, "I know Mo is contrite, angry at himself and remorseful for what he has done . . . . Whatever penalty he receives will pale compared to the self-inflicted, devastating, emotional penalty he is suffering and will suffer because of this late life transgression." Ex. A.12 (C. Burson).

[redacted]

E. Plea and PSR

On June 27, 2016, Mr. Zukerman pleaded guilty to the offenses of corruptly endeavoring to obstruct or impede the due administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a), and tax evasion, in violation of 26 U.S.C. § 7201. As part of his plea agreement, Mr. Zukerman agreed not to contest an order of $37,000,000 in restitution, the applicability of civil fraud penalties on that amount, plus any additional sales and use taxes that may be owed to the New York State Department of Taxation and Finance. Mr. Zukerman has already made substantial progress towards fulfilling these commitments by tendering cash deposits in excess of $37.6 million to the United States Treasury and the State of New York. In addition, in satisfaction of his plea agreement, Mr. Zukerman has seen to the filing of numerous federal and state corporate and individual tax returns for the years 2008 through 2014. This includes the voluntary amendment of tax returns for tax years on which the statutes of limitations have lapsed (the effect of which will be to restart the running of the limitations period), as well as tax returns that were not affected by the conduct to which Mr. Zukerman pleaded guilty. He has also voluntarily caused to be prepared numerous amended tax returns for the State of New York that are not required by his plea agreement. He is currently engaged in discussions with the State of New York to resolve any remaining state tax liabilities.

Under the plea agreement, Mr. Zukerman and the government agreed to an advisory Guidelines offense level of 27, which includes a three-level reduction for acceptance of responsibility. The resulting advisory Guidelines range is 70 to 87 months' imprisonment. The plea agreement recognizes Mr. Zukerman's right to ask this Court for a variance from the final advisory Guidelines range.

The U.S. Probation Office issued its draft PSR on August 19, 2016, and its final PSR on September 15, 2016. The Probation Office recommended a significant downward variance—48 months' imprisonment—based on Mr. Zukerman's lack of criminal history, commitment to philanthropic acts, significant strides in making victims whole, and his genuine remorse, regret, and acceptance of responsibility. PSR at 51. In response to the draft PSR, Mr. Zukerman raised two objections: (1) the draft PSR's statement of offense conduct appears to be copied from a government submission (without attribution) and contains uncharged and unproven allegations which Mr. Zukerman has not admitted; and (2) the draft PSR miscalculated the advisory Guidelines fine range, which, correctly calculated, is $25,000 to $250,000. In its final PSR, the Probation Office did not change its statement of offense conduct, but did attempt to correct the Guidelines fine-range calculation error (although, as explained below, its attempted correction introduced further error, *see infra* note 9).

DISCUSSION

I. The 18 U.S.C. § 3553(a) Factors Support a Downward Variance

Although the Sentencing Guidelines are the starting point for the calculation of an appropriate sentence, a district court "may not presume that the Guidelines range is reasonable."

Gall v. United States, 552 U.S. 38, 50 (2007). Instead, the court "must make an individualized assessment based on the facts" of each case, recognizing that a within-Guidelines sentence may be greater than necessary to serve the purposes of sentencing. *Id.*; *Kimbrough*, 552 U.S. at 91. If the Guidelines calculation in a given case results in an "inordinate emphasis" on "putatively measureable quantities," like financial loss, a court may focus more on the statutory factors set forth in 18 U.S.C. § 3553(a) to determine an appropriate sentence. *United States v. Adelson*, 441 F. Supp. 2d 506, 509–12 (S.D.N.Y. 2006), *aff'd*, 301 F. App'x 93 (2d Cir. 2008). The Supreme Court has held that extraordinary circumstances are *not* necessary to justify a sentence outside of the Guidelines' range. *Gall*, 552 U.S. at 47.

Accordingly, after calculating the proper offense level under the Guidelines, the district court must consider each of the § 3553(a) factors and "tailor the sentence" to fit the circumstances of the case. *United States v. Booker*, 543 U.S. 220, 245 (2005). The § 3553(a) factors include: (1) the nature and circumstances of the offense and history and characteristics of the defendant; (2) the purposes of sentencing; (3) the kinds of sentences available; (4) the Sentencing Guidelines; (5) any relevant policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted disparities among similar offenders; and (7) the need to provide restitution to victims of the offense. A court "exercise[s] a wide discretion in the types of evidence [it] may consider" when choosing an appropriate sentence to ensure it is in "possession of the fullest information possible." *Pepper v. United States*, 562 U.S. 476, 480 (2011) (internal quotation marks omitted).

The application of the § 3553(a) factors to this case strongly supports a substantial downward variance from the agreed advisory Guidelines offense level. Here, a sentence of confinement far shorter than the sentence proposed by the Guidelines or the Probation Officer, plus a significant community service commitment to be completed while on supervised release, would be sufficient, but not greater than necessary, to satisfy the purposes set forth in § 3553(a).

A. The Nature of the Offense and History and Characteristics of the Defendant

1. Nature of the Offense

In selecting a sentence, a court must consider the "nature and circumstances of the offense." 18 U.S.C. § 3553(a)(1). Mr. Zukerman admits that he committed serious crimes and accepts responsibility for his wrongdoing. This section is not meant to excuse his conduct.

Nevertheless, the "nature and circumstances of the offense" in this case suggest that an appropriate sentence is below the advisory Guidelines range and below the sentence recommended by the Probation Officer. Although the tax loss resulting from Mr. Zukerman's conduct was numerically large, his actions did not have many of the aggravating factors that often accompany tax offenses, such as the production of illegal income, the creation and promotion of fraudulent tax shelters, the abuse of a fiduciary position, or the use of offshore accounts and foreign shell companies to hide income abroad. Quite simply, the actual conduct forming the basis of the indictment is noteworthy only because of the amount of total tax loss.

a. Sale of [redacted]

The centerpiece of the government's case against Mr. Zukerman is his failure to report taxes on the 2008 sale of M.E. Zukerman Specialty Oil Company's ("MEZSOC") interest in [redacted] and his subsequent attempt to persuade the IRS that Bodley Investment Company had acquired and sold an interest in [redacted] when, in fact, it did not. *See* PSR ¶¶ 81–91. That conduct, relating to a single sale, makes up the vast majority of the $37 million tax loss, and is the government's most serious charge. Mr. Zukerman began work to see that all of the tax owed on the transaction was paid even before he was indicted, and he has already deposited the full amount of that tax with the IRS. He has also agreed to cause to be paid any assessed interest or civil penalties on that amount.

There are three mitigating considerations the Court should be aware of as it considers this charge.

First, Mr. Zukerman's conduct was, in essence, motivated by an attempt to achieve tax planning and tax savings that he thought could have been done—and, in fact, some of which properly structured, *could have* been done lawfully—if only certain essential steps had been taken in advance of the sale. Mr. Zukerman did not want to sell MEZSOC's [redacted] interest, but given [redacted] plan to sell its stake in the partnership, he concluded that it was the best available option. PSR ¶ 84. As a long-term investor who prefers to nurture his investments through thick and thin, however, Mr. Zukerman had little experience selling businesses in which he had invested. Mr. Zukerman knew that two of his entities, Arkriver Property Limited and Bodley Investment Company, had accumulated substantial investment losses in excess of U.S. $60 million that could potentially be used to offset capital gains taxes realized on the sale of [redacted]. PSR ¶ 85. Before the sale, he had hoped to restructure ownership of the [redacted] partnership interest in order to take advantage of those losses. PSR ¶ 86. Mr. Zukerman is not a tax professional, but had that restructuring timely taken place, Mr. Zukerman understood that the capital gains from the sale could have been lawfully offset in substantial part by those losses.

But the contemplated restructuring did not take place, as intended, prior to the sale. As this investigation has demonstrated, though an accomplished investor, Mr. Zukerman is incompetent at managing record-keeping and paperwork. Upon realizing that the time for any possible tax-planning had passed, and that no lawful tax-planning had been undertaken, Mr. Zukerman failed to report the income from the sale and attempted to conceal that non-reporting. PSR ¶¶ 88–91. Mr. Zukerman accepts full responsibility for his conduct, which he believes was wrong and inexcusable. Nonetheless, his actions were not part of a premeditated tax-evasion scheme hatched before the sale of [redacted]; rather, they were conceived, months after the sale, in an attempt to correct belatedly what he perceived to be a major failure to execute timely a lawful tax plan.

Second, as discussed more fully below, the tax loss caused by the [redacted] transaction—$32 million, including approximately $4 million in unreported tax on 2007 [redacted] distributions—heavily skews the advisory Guidelines calculation, which is almost entirely based on the amount of tax loss. *See* U.S.S.G. §§ 2T1.1(a)(1), 2T4.1(L). This is not a case, for example, in which a substantial tax loss was achieved through hundreds of independent acts of tax evasion over a period of years. Moreover, the amount of tax loss is arbitrarily enhanced by the fact that the [redacted] interest was owned by a corporation subject to a 35% federal tax rate. Ironically, had Mr. Zukerman personally owned [redacted] and kept 100% of the sale proceeds for himself, the then-applicable 15% individual capital gains would apply, resulting in a substantially smaller tax loss and lower advisory Guidelines offense level.

Third, the government gets it precisely backwards when it attempts to sensationalize its case by insinuating that Mr. Zukerman's motive in engaging in this tax offense was to acquire fine art to decorate his home. Mr. Zukerman has a long history of collecting fine Dutch art going back to the 1980s, and by 2008 had acquired substantial expertise in the subject, as had his daughter, Laura, who made it her professional field of study. It is an understatement to say that the sale of [redacted] in 2008 occurred during a bleak time in global financial markets. Having received a considerable lump sum in cash from the sale, and faced with plummeting financial markets, Mr. Zukerman elected instead to invest *some* of the funds in an asset class that he believed would hold value. He recorded those assets on the books of the company. He stored those assets where it made sense to store them—in his home—where they could be properly cared for and secured. There is no doubt that Mr. Zukerman and his family enjoyed and appreciated the art he acquired. But the suggestion that his motive for tax fraud was to free up additional funds to purchase art is wrong. The government ignores the fact that Mr. Zukerman utilized a substantial portion of the proceeds from the [redacted] sale for other business purposes. Indeed, the [redacted] sale would have generated funds sufficient to purchase the art *even if all taxes had been paid at the time of sale*.

b. Acquisition of Black Island

A second basis for Mr. Zukerman's guilty plea was his instruction to a tax preparer to claim charitable deductions on his personal federal tax return, totaling $1 million, for his acquisition of a 240-acre parcel on Black Island, Maine. PSR ¶ 92. In determining Mr. Zukerman's sentence, the Court should consider two mitigating facts about this transaction.

First, whether or not it was tax-deductible, the transaction had a substantial charitable component. Mr. Zukerman agreed to acquire the parcel in order to conserve it for environmental purposes. PSR ¶ 94. He supplied the funds and took title to the property, but purchased it subject to a strict conservation easement for the benefit of [redacted]. PSR ¶ 95. The easement dramatically restricts his use of the property, prohibits any development on 239 of the 240 acres, and designates over 200 acres as a public access area. PSR ¶ 96. Moreover, Mr. Zukerman has never built any structures on the remaining acre; instead, he has left the island pristine. *Id.* In the last several years, he has not even set foot on the island. In short, the acquisition was largely charitable in intent—whether or not Mr. Zukerman could legally deduct it from his taxes.

Second, had the transaction been structured in a different way, Mr. Zukerman might have been entitled to a charitable deduction of some amount. The acquisition employed an unusual structure: [redacted] acquired several parcels and transferred them to a holding company; the holding company created a new 240 acre lot from the parcels and granted a conservation easement to [redacted]; and the holding company then transferred the lot to an entity controlled by Mr. Zukerman. PSR ¶ 95. This structure meant that Mr. Zukerman could not treat the acquisition or the easement as a tax-deductible charitable donation, and he should have, but did not, seek out professional tax advice before agreeing to it. *Id.* Had Mr. Zukerman simply imposed the easement himself, after he acquired the property, he would have been able to take a charitable deduction for the value of the easement. Alternatively, had Mr. Zukerman simply donated the full $1 million to [redacted] to fund the purchase, he would have achieved essentially the same result—no development on Black Island—and been entitled to a $1 million tax deduction.

[redacted]

A third basis for Mr. Zukerman's guilty plea were his instructions to a tax accountant to claim deductions on [redacted] for business expenses that were not, in fact, deductible. PSR ¶ 97. Mr. Zukerman acknowledges that these deductions were improper. [redacted]; for him, among the charges to which he has pleaded guilty, this one may be the hardest to bear. The total estimated federal tax loss attributable to these deductions averages to [redacted] and has already been tendered to the IRS.

d. Other Alleged Conduct

In addition to the core conduct to which Mr. Zukerman pleaded guilty, the government in its indictment and PSR statement "piles-on" with a grab-bag of other, unrelated offenses and allegations in an attempt to portray Mr. Zukerman as a compulsive tax-evader who deserves the harshest possible treatment. *See* PSR ¶¶ 41–72. In some cases, the alleged conduct was not a predicate for Mr. Zukerman's guilty plea, and some of the government's accusations are extremely minor. [redacted] We submit that the focus of this sentencing proceeding should be the core conduct to which Mr. Zukerman has pleaded guilty—discussed above—and not these ancillary issues. Accordingly, we will not attempt to respond to each of the government's accusations individually, but will be prepared to answer any questions should the Court wish to explore further any of these matters. Nonetheless, for illustrative purposes, a few merit mention now:

– Non-reporting of household employees' wages: The government accuses Mr. Zukerman of unlawfully paying [redacted] cash wages that Mr. Zukerman [redacted] did not report [redacted]. PSR ¶¶ 41–43. [redacted] Admittedly, the Zukermans also gave [redacted] funds in cash over and above her regular salary, and they did not report amounts paid to [redacted] In short, at least some of the unreported cash the Zukermans provided to [redacted] was intended as a gift, and was therefore non-taxable. *See, e.g.*, *Arnold v. Bingler*, 254 F. Supp. 156, 157 (W.D. Pa. 1966) (transfers of stock by owner of corporation to key employees, in addition to regular salaries, were gifts motivated by "sentiments of benevolence and generosity" rather than taxable compensation); *Johnson v. Commissioner*, 48 T.C. 636 (1967) (amounts paid to part-time gardener by wealthy employer in addition to regular compensation were gifts, not taxable income). Mr. Zukerman does not contest the underlying facts, but he does contest the government's suggestion that his generosity justifies enhancing his punishment.

– Health care fraud: According to the government, Mr. Zukerman engaged in health care fraud by [redacted] on a corporate health insurance plan reserved for full-time employees and paying for it with about $2,000 per year in corporate funds. [redacted]; accordingly, Mr. Zukerman decided to help her. He used the corporate plan for that purpose on the basis that a portion of [redacted] housekeeping work benefits MEZCO—including the assistance she provides to Mr. Zukerman when he works remotely from his home office in Maine—and that the cost was immaterial.

– Corporate diversions to [redacted]: According to the government, Mr. Zukerman "used corporate entities he controlled to pay hundreds of thousands of dollars of fee income on an annual basis to [redacted] Ordinarily, this type of value-of-services dispute is resolved with the IRS as a civil matter.

– Use tax on art acquisitions: The government spills much ink over Mr. Zukerman's alleged scheme to avoid New York sales and use taxes on purchases of fine art. Mr. Zukerman does not dispute that he structured art purchases to, among other things, minimize taxes, and that the structuring did not work. Accordingly, he has agreed to cause to be paid use taxes to the

State of New York as a part of his plea agreement. However, it is worth noting that many purchasers of fine art lawfully limit their state use tax obligations by using similar techniques. *See, e.g.*, Graham Bowley & Patricia Cohen, *Buyers Find Tax Break on Art: Let It Hang Awhile in Oregon*, N.Y. Times, Apr. 13, 2014, at A1. It is highly unusual for the federal government to pursue criminal charges against a state taxpayer for alleged state use tax underpayment, and the State of New York regularly resolves similar cases without resort to criminal penalties. *See, e.g.*, Charles V. Bagli, *Developer to Pay State $7 Million for Sales Taxes on Art*, N.Y. Times, May 4, 2016, at A15 (monetary settlement with Aby Rosen for unpaid sales and use taxes on 200 works of art); N.Y. State Office of the Attorney General, *A.G. Schneiderman Announces Agreement with Art Sales Executive For Re-Payment of Taxes on Artwork Acquisitions* (May 3, 2016), http://www.ag.ny.gov/press-release/ag-schneiderman-announces-agreement-art-sales-executive-re-payment-taxes-artwork (monetary settlement with Victoria Gelfand for unpaid sales and use tax on more than 30 works of art).

2. History and Characteristics of the Defendant

Mr. Zukerman's "history and characteristics" weigh in favor of a non-Guidelines sentence. "[I]f ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance." *Adelson*, 441 F. Supp. 2d at 513–14. Mr. Zukerman is, by all accounts, a generous, hardworking man, with close ties to his family and community. The crimes to which he has pleaded guilty, although serious, stand in stark contrast to seventy-two otherwise exemplary years. In the words of a longtime friend, "[t]his is one incredibly black mark in an otherwise spotless and shining life." Ex. A.9 (Stern).

As described above, the nearly one hundred letters submitted to the Court by family, friends, employees, and associates reveal a man who has been appreciated and admired by those who know him. We ask the Court to consider the words of those who know Mr. Zukerman best in weighing the importance of § 3553(a)(1) in this case, including the following:

- By all accounts, Mr. Zukerman is deeply devoted to his family, and he plays an integral and irreplaceable role in their lives. [redacted]

- Mr. Zukerman overcame the early loss of his mother and a chaotic childhood to build, through hard work, a successful investment business that provides jobs to hundreds of people. He is, by all accounts, a supportive and generous employer who has repeatedly gone above-and-beyond to assist employees during times of crisis. His criminal

[redacted]

conviction has left the businesses he built in a precarious state, and many have expressed fear that they cannot survive without him. A lengthy period of incarceration jeopardizes not just Mr. Zukerman and his family, but the lives of hundreds of employees who rely on him.

- As dozens of people from all walks of life attest, Mr. Zukerman has repeatedly demonstrated his personal commitment to helping others, both through significant charitable gifts, many anonymous, and through his day-to-day service to the individuals with whom he comes in contact. He has been exceedingly generous with his time and attention to anyone who walks through his door. An extraordinary number of people describe their interactions with him as significant turning points in their lives. He has been, and continues to be, a positive influence in the lives of many, many people.
- Outside of the conduct at issue in this case, Mr. Zukerman has never been charged with a crime of any sort. Although the government portrays Mr. Zukerman as a serial tax evader, it is also important to keep in mind that he has still paid millions of dollars in federal and state taxes over the years. Further, he has accepted responsibility for his conduct and is fully committed to making things right by seeing to the payment of all taxes owed. This is demonstrated by the fact that he has already tendered in excess of $37 million to federal and state authorities—the total amount of restitution sought by the government in this case. He has also caused to be filed scores of amended and new federal and state tax returns, including returns whose limitations periods have already lapsed, returns that have nothing to do with the conduct to which he pleaded guilty, and returns his plea agreement does not require him to file. These returns will likely result in the payment of taxes in addition to those included in the restitution amount.

Many courts have exercised their discretion to impose non-Guidelines sentences on similar facts. *See, e.g.*, *United States v. Mullings*, 131 F. Supp. 3d 1, 4 (E.D.N.Y. 2015) (non-Guidelines sentence appropriate where custodial sentence would "cause hardship to [defendant's] wife and three young children who all depend on him"); *United States v. Marsh*, 820 F. Supp. 2d 320, 351 (E.D.N.Y. 2011) (non-Guidelines sentence appropriate because longer sentence of imprisonment "would likely cause undue stress to [defendant's] child"); *United States v. Trupin*, No. 97-CR-97 (LMM) (S.D.N.Y. Jan. 16, 2009), Dkt. 129 at 31:25–36:24 (excerpt attached as Ex. E) (non-Guidelines sentence appropriate where imprisonment "w[ould] likely have a disastrous impact" on defendant's wife, who suffered from psychiatric disorder); *United States v. Milikowsky*, 65 F.3d 4, 8–9 (2d Cir. 1995) (affirming downward departure based on defendant's "indispensability" to businesses and concern that "imprisonment would impose extraordinary hardship on employees"); *United States v. Tomko*, 562 F.3d 558, 572 (3d Cir. 2009) (en banc) (affirming downward variance in tax-evasion case based, in part, on concern that "incarceration would threaten the jobs of . . . over-300 employees"); *United States v. Warner*, 792 F.3d 847, 858 (7th Cir. 2015) (affirming sentence of probation in tax-evasion case based, in part, on fact that defendant displayed "'humanity and concern for the welfare of others' and acted with 'the purest of intentions,' often 'quietly and privately'" (citation omitted)); *United States v. Gupta*, 904 F. Supp. 2d 349, 353 (S.D.N.Y. 2012) (premising downward variance, in part, on defendant's "big heart and helping hand, which he extended without fanfare or self-promotion, to all with whom he came in contact"), *aff'd*, 747 F.3d 111 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1841 (2015); *Adelson*, 441 F. Supp. 2d at 513 (premising downward variance, in part, on letters from "persons from all walks of life . . . attesting, from personal knowledge, to [defendant's] good works and deep humanity," his "'generosity of spirit,'" and his "integrity and generosity").

In addition, this Court may also consider Mr. Zukerman's advanced age and health status when determining what sentence is appropriate. *See, e.g.*, *United States v. Chase*, 560 F.3d 828, 829–31 (8th Cir. 2009) (age and health is relevant under § 3553(a), particularly when a sentence "for a man [defendant's] age could very well result in his death while incarcerated"); *United States v. Collins*, No. 05 Cr. 1193-02(RWS), 2007 WL 1723718, at *6 (S.D.N.Y. June 7, 2007) (defendant's "advanced age" a factor supporting a downward variance); *United States v. Barbato*, No. 00 CR. 1028(SWK), 2002 WL 31556376, at *5 (S.D.N.Y. Nov. 15, 2002) (imposing downward departure based on "combination of [defendant's] medical condition and his advanced age"); *see also Lee v. United States*, No. 13 Cr. 290 (PAC), 2016 WL 3212107, at *2 (S.D.N.Y. June 7, 2016) (observing two-year prison term is "substantial sentence" for defendant of "advanced age").

Mr. Zukerman is 72 years old. [redacted]

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[3] According to a recent actuarial life table published by the Social Security Administration, over 25% of men currently age 72 are expected to die within 8 years or less. *See* Social Security Administration, *Actuarial Life Table*, https://www.ssa.gov/oact/STATS/table4c6.html#ss (last visited Nov. 21, 2016). Studies have found, unsurprisingly, that individuals like Mr. Zukerman who [redacted]

[redacted] Studies have established that imprisonment has a significant, detrimental effect on the health of elderly offenders. One Department of Justice report found that first-time elderly offenders are "'easy prey' for more experienced predatory inmates" and "are likely to have problems adjusting to prison since they are new to the environment, which will cause underlying stress and probable stress-related health problems." B. Jaye Anno et al., *Correctional Health Care, Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates* 10 (DOJ Nat'l Inst. Of Corrections 2004). They are also subject to a dramatic escalation in mortality rates, particularly those over the age of 65, as well as accelerated physiological aging. *See* Christopher J. Mumola, *Medical Causes of Death in State Prisons, 2001–2004*, Bureau of Justice Statistics Data Brief NCJ216340 at 2 (DOJ Jan. 2007); Mike Mitka, *Aging Prisoners Stressing the Health Care System*, 292 JAMA 423, 423–24 (July 28, 2004). As one court has acknowledged, "[f]ew cases involve defendants in this age range, and those that do have found it significant." *United States v. Baron*, 914 F. Supp. 660, 662 (D. Mass. 1995).

Under these circumstances, a within-Guidelines sentence for Mr. Zukerman could very well be a life sentence. Even a shorter sentence may have irreparable, detrimental effects on Mr. Zukerman's quality of life in his remaining years. "The best policy considerations can be unnecessarily cruel when applied rigidly and without exception to individual human beings . . . . Some [offenders] would be destroyed by a term in prison." *Baron*, 914 F. Supp. at 665 (alterations in original) (internal quotation marks omitted).

B. The Purposes of Sentencing

Each sentence imposed should also reflect the four purposes of sentencing set out in 18 U.S.C. § 3553(a)(2):

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The statute explicitly instructs that the sentence should be "sufficient, *but not greater than necessary*," to comply with these four purposes. 18 U.S.C. § 3553(a) (emphasis added).

A lengthy sentence of imprisonment is not necessary in this case "to reflect the seriousness of the offense," "to promote respect for the law," or "to provide just punishment." *Id.* Mr. Zukerman understands that he has pleaded guilty to serious crimes and that this Court must impose a sentence that reflects their seriousness. Yet the advisory Guidelines range in this case—70 to 87 months, which, for a 72-year-old man, could very well be a life sentence—is a draconian penalty far greater than necessary to achieve a fair and reasonable punishment.

This high advisory Guidelines range is driven almost entirely by a single factor: the amount of the tax loss resulting from failing to report income on the sale of [redacted]. "By making a Guidelines sentence turn, for all practical purposes, on [the amount of monetary loss or gain occasioned by the offense], the Sentencing Commission effectively ignored the statutory requirement that federal sentencing take many factors into account, *see* 18 U.S.C. § 3553(a), and, by contrast, effectively guaranteed that many such sentences would be irrational on their face." *Gupta*, 904 F. Supp. 2d at 351; *see also United States v. Caspersen*, No. 16-CR-00414 (JSR) (S.D.N.Y. Nov. 4, 2016), Dkt. 37 at 3:16–18 (excerpt attached as Ex. H) (loss amount contributing 22 of 34 total Guidelines offense-level points should not "occupy . . . , as it does in so many guideline cases, such an inordinate position, overwhelming every other factor"); Derick R. Vollrath, Note, *Losing the Loss Calculation: Toward a More Just Sentencing Regime in White-Collar Criminal Cases*, 59 Duke L.J. 1001, 1023–25 (2010) (discussing how advisory Guidelines' emphasis on loss "fail[s] to accurately reflect a defendant's culpability"). In this case, the Guidelines' singular focus on the amount of tax loss from the [redacted] sale skews the range even more than in a typical case. Indeed, under the advisory Guidelines, all of the other offenses the government alleges Mr. Zukerman has committed—including offenses to which he has not pleaded guilty—would yield a significantly lower offense level than the [redacted] transaction *charged by itself*.

Moreover, the Tax Guidelines are a particularly problematic starting point for the sentencing analysis because they have been repeatedly and arbitrarily increased over the years in a manner disproportionate to offenders' relative culpability. As another judge in this district recently observed:

> When the guidelines were first promulgated in the early 1980s, all the guidelines were intended to reflect in some sense what was the mean average [sentence for each offense, historically], except for white collar crimes, which were intended to be higher. And since then, [the white collar crime Guidelines have] been ratcheted up every few years so that they're now many times what they were when the guidelines first came in . . . . [The Guidelines are therefore] a pernicious starting point, because they carry the aura but not the reality of something that is rationally arrived at.

Caspersen, No. 16-CR-00414 (JSR), Dkt. 37 at 4:7–5:1 (excerpt attached as Ex. H); *see also id.* at 80:15–18, 81:14–82:8 (rejecting advisory Guidelines range of 15 years as "absurd" and imposing sentence of 48 months' imprisonment). Under the 1987 Tax Guidelines, Mr. Zukerman's offense level would have been 18, correlating to 27 to 33 months' imprisonment.[4] *See* U.S.S.G. §§ 2T1.1(a)–(b), 3E.1.1, 5A (1987). The Guidelines now recommend a sentence almost three times that length. That increase ignores the relevant facts of the offense and treats

[4] Assuming a two-level "sophisticated means" enhancement and a two-level decrease for acceptance of responsibility. *See* U.S.S.G. §§ 2T1.1(b), 3E1.1 (1987). At the time, the Guidelines did not allow for a three-level decrease for acceptance of responsibility. *See* U.S.S.G. § 3E1.1 (1987).

sentencing "as an exercise in bean counting, as opposed to one of the most difficult tasks that . . . judges have to undertake, which is a moral judgment on a fellow human being." *Caspersen*, No. 16-CR-00414 (JSR), Dkt. 37 at 80:16–19 (excerpt attached as Ex. H); *see also Gupta*, 904 F. Supp. 2d at 351 (observing that same offense yielded a 30–37 month sentence under 1987 Guidelines but a 151–188 month sentence under 2003 Guidelines and asking, "[w]as such a crime really 500% worse in 2003 than it was in 1987?").

Recognizing that the Guidelines are unjustifiably harsh in this case, Mr. Zukerman's Probation Officer has recommended a below-Guidelines sentence of 48 months' imprisonment. That recommendation, however, is still far "greater than necessary" to achieve the purposes of sentencing. 18 U.S.C. § 3553(a). A considerably shorter term of confinement would still be more than enough to convey the seriousness of, and provide significant punishment for, Mr. Zukerman's offenses—particularly when considered in context with Mr. Zukerman's age, health status, and the collateral consequences of the investigation, indictment, and guilty plea. Mr. Zukerman has only limited time left, and the years spent under investigation have put enormous stress on him, his family, and his businesses. His indictment and guilty plea have received worldwide publicity, and he has, by all accounts, suffered profoundly. Beyond repaying the taxes he and his companies owe, he faces potentially enormous financial penalties that may yet drive his family or his companies into bankruptcy. And in an industry where trust is paramount, Mr. Zukerman's heretofore unblemished reputation for honesty and integrity has been destroyed. For Mr. Zukerman, there is no greater punishment.

Further, a far shorter period of confinement would still be more than enough to "afford adequate deterrence." *See, e.g.*, *Gupta*, 904 F. Supp. 2d at 355 (imposing sentence of 24 months' imprisonment where Guidelines range was 78 to 97 months and observing that "[a]s to specific deterrence, it seems obvious that, having suffered such a blow to his reputation, [the defendant] is unlikely to repeat his transgressions, and no further punishment is needed to achieve this result"); *United States v. Alatsas*, No. 06-CR-473 (JBW), 2008 WL 238559, at *2 (E.D.N.Y. Jan. 16, 2008) (imposing sentence of probation where Guidelines range was 24 to 30 months' imprisonment and observing that "[s]pecific deterrence is provided by the shame created by the felony convictions, the cost of defense and strict restitution requirements"). Again, Mr. Zukerman has fully and forthrightly accepted responsibility for his crimes and began negotiating a guilty plea prior to his indictment. He has no criminal record, is 72 years old, and has both publicly and privately expressed sincere remorse for his actions. He represents no risk of recidivism.

As to general deterrence, "there is[ ]considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders."[5] *Adelson*, 441 F. Supp. 2d at 514 (citing Richard S. Frase, *Punishment Purposes*, 58 Stan. L. Rev. 67, 80 (2005); Elizabeth Szockyj, *Imprisoning White-Collar Criminals?*, 23 S. Ill. U. L.J. 485, 492 (1999)). The Guidelines themselves advise that in cases involving economic crimes, including tax evasion, the "prospect of prison, *even though the term may be short*, will serve as a significant deterrent." U.S.S.G. Ch. 1, Pt. A., intro. cmt. 4(d) (emphasis added); *accord United*

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[5] There is also consensus that the simplified "economic" model of general deterrence taught in law schools—which posits that longer prison sentences have greater deterrent effect—is deeply flawed in the tax context. *See, e.g.*, Mark D. Phillips, *Reconsidering the Deterrence Paradigm of Tax Compliance*, https://www.irs.gov/pub/irs-soi/11resconreconsider.pdf (last visited Nov. 17, 2016) ("[W]hile the deterrence paradigm represented economists' initial attempt towards understanding compliance, it has fallen out of favor in recent decades."); Joel Slemrod, *Cheating Ourselves: The Economics of Tax Evasion*, 21 J. Econ. Perspectives 25, 38 (2007) ("[T]here has been no compelling empirical evidence addressing how noncompliance is affected by the *penalty* for detected evasion . . . ."); Richard K. Gordon, *Law of Tax Administration and Procedure, in* 1 *Tax Law Design and Drafting* 124 (Victor Thuronyi, ed. IMF 1996) ("[T]here is not much evidence to suggest that [tax] compliance varies directly with the degree of severity of the sanctions.").

States v. Werdiger, No. 10-CR-325 (PGG) (S.D.N.Y. Nov. 9, 2011), Dkt. 31 at 49:12–50:16 (excerpt attached as Ex. C) (concluding that 12 months' and one day's imprisonment in tax evasion case where Guidelines range was 24 to 30 months would satisfy "need for general deterrence"); *United States v. Trupin*, No. 97-CR-97 (LMM) (S.D.N.Y. Jan. 16, 2009), Dkt. 129 at 38:9–19 (excerpt attached as Ex. E) (concluding, on remand from the Second Circuit, that 7 months' imprisonment in tax evasion case where advisory Guidelines range was 41 to 51 months would "afford adequate deterrence").[6] Mr. Zukerman's indictment and guilty plea have been extensively publicized. Anyone paying attention to this case will know that the consequences of tax evasion can include the destruction of offenders' careers and reputations, public scorn, a complete loss of personal dignity and privacy for themselves and their families, and the loss of tens of millions of dollars. Condemning Mr. Zukerman to life in prison would add nothing to that message. Even a short sentence of confinement will still result in Mr. Zukerman spending a significant portion of his remaining life (and a higher portion of his remaining potentially productive time) in prison.

Finally, no term of imprisonment is required to "protect the public from further crimes" or to provide Mr. Zukerman with "needed educational or vocational training, medical care, or other correctional treatment." The tax offenses to which Mr. Zukerman has pleaded guilty do not implicate public safety and resulted in no victims apart from the state and federal treasuries. In fact, a sentence that allows Mr. Zukerman to use his unique background and skills to provide services outside of prison would actually have a net positive impact on his community.

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[6] In *Trupin*, the Second Circuit held that seven months' imprisonment was unreasonable. *See United States v. Trupin*, 475 F.3d 71 (2d Cir. 2007). The Supreme Court vacated the Second Circuit's decision, *see Trupin v. United States*, 552 U.S. 1089 (2008), and on remand the district court imposed the same sentence.

C. The Kinds of Sentences Available

This Court has discretion to consider a wide range of alternatives to the lengthy terms of imprisonment suggested by the advisory Guidelines and the Probation Officer. In this case, a far shorter sentence of confinement, combined with a community service order that takes advantage of Mr. Zukerman's unusual skill set, would better satisfy the goals of sentencing. Indeed, it is well-recognized that community service "can carry both the community and [the] Court's condemnation of [the defendant's] conduct but channel it in a way that's more constructive" than incarceration. *United States v. Shamilzadeh*, No. 04-CR-01094 (JG) (E.D.N.Y. Apr. 1, 2008), at 18:22–25 (excerpt attached as Ex. G) (sentencing individual convicted of $110 million fraud to five years' probation and 500 hours' community service).

Mr. Zukerman is an ideal candidate for community service. He is a non-violent, first-time offender with a long history of charitable and philanthropic activity. He is highly motivated to continue to serve his community, mentoring comes naturally to him, and he has the skills and the background—including fluency in multiple languages, advanced education, a distinguished professional career, and a special ability to relate to people of all backgrounds—that would make him an asset to any charitable organization.

Recently, Mr. Zukerman has volunteered a significant portion of his time to The Fortune Society, an organization that provides services to incarcerated and formerly incarcerated individuals to help them "thrive as positive, contributing members of society." The Fortune Society, *http://fortunesociety.org/#news* (last visited Dec. 15, 2016). Through The Fortune Society, Mr. Zukerman gives instruction on resume-writing and job interviewing. His educational and professional background make him particularly well-suited to provide these services. As Tara Mullaney, who oversees the volunteer program at The Fortune Society, observes:

> Mr. Zukerman has quickly developed a rapport with the clients he is engaged with . . . . He is clearly very adept at this work, and his contributions have already proven valuable to the Employment Services program and clients. His fluency in Spanish and French allow for a more in depth and fruitful conversation with clients who are more comfortable speaking in their native language. In addition, he has 'cultural competencies' that allow him to relate and empathize with our clients . . . . And of course, given Mr. Zukerman's distinguished career, he has excellent interpersonal and communications skills.

Ex. A.102 (Mullaney).

The Fortune Society has indicated that it "would welcome, and can readily accommodate," a term of Court-ordered community service by Mr. Zukerman, and that in addition to resume-writing and practice interviews, he might also be helpful "in areas such as [t]utoring or light administrative work." *Id.* We urge the Court to consider a term of community service with The Fortune Society (or another organization of the Court's choosing) as a special condition of release, in lieu of a lengthier period of confinement. Indeed, a term of service with The Fortune Society would be particularly suitable in this case. Instead of sentencing Mr. Zukerman to "rot in prison for years on end," *Caspersen*, No. 16-CR-00414 (JSR), Dkt. 37 at 82:3–4 (excerpt attached as Ex. H), Mr. Zukerman could devote his time, energy, and skills to rehabilitating and improving the lives of the very individuals with whom he would otherwise be incarcerated.

D. The Sentencing Guidelines and Pertinent Policy Statements

Mr. Zukerman acknowledges that the PSR correctly calculated the applicable advisory Guidelines range for an offense level of 27. Although the Guidelines recommend that general deterrence be a primary consideration in criminal tax sentences, U.S.S.G. Ch. 2, Pt. T, intro. cmt., as noted above, they also emphasize that a short term of imprisonment "serve[s] as a significant deterrent," *id.* at Ch. 1, Pt. A., intro. cmt. 4(d). Courts have held that in tax evasion cases, even a non-custodial sentence can provide sufficient general deterrence. *See, e.g.*, *Warner*, 792 F.3d at 860–61 (observing that "the general proposition that effective deterrence of tax crimes requires a credible threat of imprisonment . . . does not necessitate imprisonment in every case"); *United States v. Klein*, No. 11-CR-255, 2011 WL 6779309, at *3 (E.D.N.Y. Dec. 27, 2011) (imposing sentence of one day's imprisonment and three years' supervised release and concluding that "[g]eneral deterrence is satisfied" because sentence "will send a clear message that any involvement in . . . tax evasion will result in a substantial restraint on liberty, as well as significant financial burdens"). For reasons already discussed above, general deterrence can be accomplished in this case with a considerably below-Guidelines sentence. Additional comments on the Guidelines are included in other sections of this memorandum.

E. The Need To Avoid Unwarranted Disparities Among Similar Offenders

1. Similarly Situated Individuals Receive Sentences Below the Guidelines Minimum

Federal sentencing data demonstrate that many judges have recognized that the advisory Guidelines for tax offenses, being primarily driven by "loss amount," can produce sentences of imprisonment that are significantly "greater than necessary" to achieve the purposes of sentencing. Since the Supreme Court's decision in *Kimbrough v. United States*, 552 U.S. 85 (2007),[7] over 70% of individuals sentenced for tax offenses and scored under U.S.S.G. § 2T1.1 for tax losses greater than $1 million have received below-Guidelines sentences—even after excluding those who received downward departures under U.S.S.G. § 5K1.1. Ex. B (Declaration of Meredith Patti ("Patti Decl.")). Among that group, the average sentence of imprisonment was *twenty months* below the Guidelines minimum. *Id.* The results are similar even if one looks only at individuals in higher tax loss categories. *See id.* For example, even among the relatively

[7] *Kimbrough* confirmed that under *United States v. Booker*, 543 U.S. 220 (2005), federal district judges have discretion to impose sentences outside of the Guidelines range in all cases.

small number of defendants who had tax losses greater than $20 million, 71% received below-Guidelines sentences. *Id.* Those sentences averaged 27.8 months below the Guidelines minimum. *Id.*

These statistics plainly demonstrate that defendants who, like Mr. Zukerman, pleaded guilty and have no prior criminal history but significant total tax losses, overwhelmingly receive downward variances. A few anecdotal examples illustrate this point:

- Ty Warner, No. 13-CR-00731, pleaded guilty in the Northern District of Illinois to tax evasion for hiding assets worth over $100 million in undisclosed foreign bank accounts. His Guidelines calculation was 46 to 57 months' imprisonment, but he was sentenced to two years' probation and community service. His sentence was affirmed by the Seventh Circuit. *See Warner,* 792 F.3d at 858.

- Jeffrey Greenstein and Charles Wilk, No. 08-CR-00296, pleaded guilty in the Western District of Washington to conspiracy to defraud and aiding and assisting in the filing of false returns for devising a tax shelter that helped clients evade taxes totaling $240 million. Their Guidelines calculation called for 108 to 135 months' imprisonment, but they were sentenced to 50 months each—54% below the Guidelines minimum.

- Peter Troost, No. 13-CR-00185, pleaded guilty in the Northern District of Illinois to one count of tax evasion for a scheme to evade over $1 million of tax that lasted for more than a decade. Although his Guidelines range was 37 to 46 months, he was sentenced to 12 months and one day—68% below the Guidelines minimum.

- Harold Rosenberg, No. 12-CR-00835, pleaded guilty in the Southern District of New York to one count of tax evasion for failing to file income tax returns and report illegal income over a period of six years. His Guidelines range was 24 to 30 months' imprisonment, but he was sentenced to 6 months—75% below the Guidelines minimum.

- Cheang Chea, No. 10-CR-00042, pleaded guilty in the District of Rhode Island to two counts of tax evasion, mail fraud and three counts of theft from a healthcare benefit program for running an employment agency that enabled his clients to evade over $14 million in taxes. His Guidelines range was 46 to 57 months, but he was sentenced to 24 months—48% below the Guidelines minimum.

- Gus Gardellini, No. 06-CR-00355, pleaded guilty in the District Court of the District of Columbia to filing a false tax return, generating a Guidelines range of 10 to 16 months. He was sentenced instead to probation, and his sentence was affirmed by the D.C. Circuit. *See United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008).

- William Tomko, No. 04-CR-00108, pleaded guilty in the Western District of Pennsylvania to one count of tax evasion for running a multi-year scheme to falsify invoices in order to illegally deduct certain payments as business expenses. His Guidelines range was 12 to 18 months, but he was sentenced instead to home confinement and probation. His sentence was affirmed by the Third Circuit. *See United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009) (en banc).

A sentence of confinement considerably shorter than the sentences proposed by the Guidelines and the Probation Officer would therefore be in line with the types of sentences that other judges have imposed in similar cases.

It is also important to point out that *any* sentence of confinement would still be exponentially more severe—and provide substantially greater deterrent value—than the punishment meted out to tens of thousands of individuals who have committed serious tax fraud by concealing assets in overseas bank accounts. Many have received complete amnesty from criminal prosecution. *See* IRS, *Offshore Compliance Programs Generate $8 Billion; IRS Urges People to Take Advantage of Voluntary Disclosure Programs*, IR-2015-116 (Oct. 16, 2015) (asserting more than 54,000 individuals have participated in program, resulting in collection of "more than $8 billion"), https://www.irs.gov/uac/newsroom/offshore-compliance-programs-generate-8-billion-irs-urges-people-to-take-advantage-of-voluntary-disclosure-programs. Among the few individuals who have been prosecuted, most have been sentenced to probation and/or home detention notwithstanding the relative culpability of their conduct or the advisory Guidelines' recommendation. *See, e.g.*, *United States v. Vogliano*, No. 10-CR-00327 (S.D.N.Y. Apr. 13, 2010), Dkt. 2, ¶¶ 7–14 (excerpt attached as Ex. I) (individual established foreign accounts in the names of shell corporations and repatriated money by traveling to Zurich and mailing traveler's checks to himself; after learning of criminal investigation, transferred funds to a bank not under investigation; sentenced to two years' probation); *United States v. Curran*, No.

12-CR-80206 (S.D. Fla. Apr. 25, 2013), Dkt. 41 at 16:9–21 (excerpt attached as Ex. F) (Guidelines range 30 to 37 months' imprisonment; sentenced to one year's probation); *United States v. Homann*, No. 09-CR-00724 (D.N.J. Feb. 16, 2010), Dkt. 16 at 2:21–25, 10:4–7 (excerpt attached as Ex. D) (Guidelines range 30 to 37 months' imprisonment; sentenced to 5 years' probation and 300 hours' community service). The Tax Guidelines were developed before these amnesty programs existed, and their recommendations have not been adjusted to account for the wide disparity in treatment between individuals who qualify for these programs and all other tax offenders.

2. Similarly Situated Individuals Receive Fines Below or Within the Guidelines Range

Imposing no fine—or at most a modest, within-Guidelines fine—would also be consistent with fines imposed on similarly situated individuals. Courts do not impose fines in the majority of criminal tax cases. Ex. B (Patti Decl.). In fact, among all individuals sentenced between 1999 and 2015 for tax losses between $20 million and $100 million—Mr. Zukerman's loss category—almost 90% received no fine. *Id.* In the criminal tax cases in which courts chose to impose a fine, the fine was below or within the Guidelines range over 90% of the time. *Id.*

Here, the advisory Guidelines fine range is $25,000 to $250,000, PSR at 50,[8] and the Probation Office recommends a fine of $100,000. A $100,000 fine would be unusually high for an individual in Mr. Zukerman's loss category. As noted above, most individuals in Mr. Zukerman's loss category receive *no fine*; among the few individuals who were fined, the average fine was $35,000, and the *largest* fine was $100,000. *Id.*

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[8] Paragraphs 167 and 169 of the PSR misstate the statutory maximum fine and the Guidelines' recommended fine range. The statutory maximum fine range for each count is set by 18 U.S.C. § 3571(d), which permits a maximum fine of up to "twice the gross gain or twice the gross loss." As stipulated in Mr. Zukerman's plea agreement, however, the correct maximum fine under the Guidelines is capped at $250,000. *See* U.S.S.G. § 5E1.2(c)(2)–(3). Although this maximum does not apply if the defendant is "convicted under a statute authorizing . . . a maximum fine greater than $500,000," *id.* § 5E1.2(c)(4), neither statute of conviction authorizes such a fine. *See* 26 U.S.C. § 7201 (maximum fine of $100,000); 26 U.S.C. § 7212 (maximum fine of $5,000). Mr. Zukerman was not "convicted under" 18 U.S.C. § 3571(d), and it therefore does not factor into the Guidelines analysis. *See United States v. Chusid*, 372 F.3d 113, 118 (2d Cir.

The advisory Guidelines identify eight factors to consider when determining the amount of a fine, including the purposes of sentencing, restitution that the individual is already obligated to make, collateral consequences of conviction (including potential civil liabilities), and the expected costs to the government of imprisonment and supervised release. *See* U.S.S.G. § 5E1.2(d). Factors cited in the rare cases where courts have elected to impose an above-Guidelines fine include the fact that the restitution does not represent complete disgorgement of an unlawful gain, *see United States v. Leonard*, 67 F.3d 460, 462 (2d Cir. 1995) (per curiam), and an individual's prior criminal history or obstruction of a probation officer, *see United States v. Greene*, 296 F. App'x 697, 699 (10th Cir. 2008).

The Guidelines factors strongly suggest that no fine is appropriate here. As part of his plea agreement, Mr. Zukerman has agreed to pay or cause to be paid all taxes owed, and he and the relevant entities have already tendered $37.6 million to satisfy his anticipated restitution obligation. They will be required to pay interest to the IRS on these amounts, as well as substantial civil penalties, which he has agreed not to contest. With regard to his state tax liabilities, Mr. Zukerman and his companies likewise will have to pay interest and, potentially, substantial civil penalties. An additional fine on top of those amounts would serve no useful purpose; indeed, Mr. Zukerman's anticipated tax penalties will cover, many times over, any "expected costs to the government" of any term of confinement and supervised release. Mr.

2004) (per curiam) (holding Guidelines fine range should be calculated without regard to 18 U.S.C. § 3571).

Zukerman has no criminal history, and since his guilty plea has complied with all Probation Office requests. There is no need to "pile-on" a punitive fine in this case.

F. The Need To Provide Restitution to Victims of the Offense

Mr. Zukerman has already tendered deposits totaling over $37 million to the only two victims in this case, the United States Treasury and the State of New York, to satisfy any order of restitution imposed by the Court. This amount exceeds the amount of restitution requested by the United States and recommended by the Probation Office. *See* PSR ¶ 73; *id.* at 50.

CONCLUSION

Mr. Zukerman takes full responsibility for his actions. Although he and his family have already paid (and will pay) considerably for his wrongdoing, he accepts that he must face further punishment. In this case, however, the Sentencing Guidelines' myopic focus on the amount of tax loss ignores the actual nature of Mr. Zukerman's conduct; a lifetime of good works and generosity; the harm a lengthy term of imprisonment will visit on family members, friends, hundreds of employees, and the community; his age and health; and myriad other facts outlined above. For the foregoing reasons and for those expressed in the letters included with this submission from those who know him best, Mr. Zukerman respectfully asks the Court to impose a below-Guidelines sentence substantially shorter than the sentence proposed by the Probation Officer, supplemented with special conditions appropriate to his crime that would benefit the community.

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Respectfully submitted,

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